No. 6855

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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LUTHER WEEDIN, as United States Commissioner of Immigration at the Port of Seattle, Washington,

Appellant,

vs.

UNG SUE CHU,

Appellee.

APPELLEE'S PETITION FOR A REHEARING

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Honorable Jeremiah Neterer, Judge.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Honorable Jeremiah Neterer, Judge.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee herein respectfully petitions the Court for a rehearing of this cause, and for a reconsideration of the judgment herein entered and filed on May 3, 1933, upon the following grounds:

I.

That this decision, if permitted to remain unaltered, can afford a new ground for excluding the wives and

minor children of regularly domiciled Chinese merchants in the United States.

II.

The importance of the question involved is not so much that it affects the rights of the appellee in this cause, but that by this decision the avenue is open for departmental rules and regulations which can emasculate a treaty right which has only been maintained since the treaty with China from the assaults of the exclusionists and sustained by every decision of this Court and the United States Supreme Court to this date; and this only after the bitterest efforts on the part of the Labor Department to break down the effect of the *Gue Lim* case, 176 U. S. 459, and the *Cheung Sum Shee* case, 268 U. S. 336.

III.

That such a result can be accomplished is not theory. It has been done in the instant case, for the appellee has been excluded because the Consul was not convinced of the relationship; yet the Labor Department concedes the relationship to be a fact; and the Labor Department under the laws of the United States, in the language of the *Polymeris* case, 284 U. S. 279, "is the only voice authorized to express its will."

IV.

This Court by its decision approves a practice which permits this consular official, **whose favorable endorsement of an application is absolutely meaningless,** and **does not give the applicant even a presumptive right of admission,**

to deny the applicant the right to have his application passed upon by the duly constituted authorities.

It may possibly have occurred that we did not make ourselves clear in our brief and oral argument, but the opinion as filed overlooks the essential points in the laws. This appellee was excluded on the ground that he was "without a passport or any official document in the nature of a passport, visaed or authenticated by an American consular officer."

I.

WIFE AND/OR MINOR CHILDREN OF A CHINESE MERCHANT ARE NOT AN IMMIGRANT UNDER THE PROVISIONS OF THE IMMIGRATION LAW OF 1924.

First, as to the visa: Nobody will dispute the fact that Congress could require these exempt Chinese aliens to procure visas if it desired to do so; but Congress has not made such a requirement, and no executive officer has authority to do so.

This Court cites in support of its opinion *U. S. ex rel. London v. Phelps,* 22 Fed. (2) 288, and *Tom Tang Shee,* 63 Fed. (2) 191, **but those were cases of immigrants.** There is no analogy between an **immigrant** and this appellee. The Supreme Court of the United States has said so in the following unmistakable language:

> The Supreme Court in the case of Cheung Sum Shee, et al., v. Nagle, 268 U. S. 336, stated that "An alien entitled to enter the United States solely to carry on trade under an existing treaty of commerce and navigation **is not an immigrant** within the meaning of the Act, section 3 (6), and, therefore, is not absolutely excluded by section 13", and, referring to

the wives and minor children of merchants, stated that "In a very definite sense they are specified by the Act itself as **'nonimmigrants'**. They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by this country twenty-five years ago."

Section 3 of the Immigration Act of 1924 says that

"No **immigrant** shall be admitted to the United States unless he (1) has an unexpired visa * * *."

It is only **immigrants** that are required to have a visa. The Supreme Court says that Chinese merchants, their wives and minor children are **not immigrants**, and no other reasonable construction can be placed upon the language used in the Immigration Act of 1924. If Congress intended that Chinese merchants, their wives and minor children should also secure visas, it would have said so in plain language: that "no **alien** shall be admitted to the United States unless he has an unexpired immigration visa," instead of "no **immigrant.**"

The Court in its opinion herein referring to *Mrs. Gue Lim* case states:

"The court held that the provisions of the Act of 1884 for certificates and visas must be construed as inapplicable to those members of several Treaty Privileged Classes of the Chinese for whom compliance with the terms of the Act **was an absolute impossibility.**"

We desire to respectfully point out that in our opinion this language evidences a misconstruction of the reasoning of the *Gue Lim* decision.

The Court's denial of the certificate requirement was not because of the "**absolute impossibility**" of securing,

nor of the fact that the wife had no status of her own, but it was because she was coming **solely on her status.** The language of the Court is this:

> "The question is, whether under the Act of 1884, construed in connection with the Treaty of 1880, the wife of a Chinese merchant, domiciled in this country, may enter the United States without a certificate, **because she is the wife of such merchant.**
>
> Although the Third article of the Treaty of 1894 does speak of certificates for Chinese subjects therein described, who already enjoy the right to enter the country, the question recurs whether the certificate of the husband, who himself enjoys the rights, is not sufficient for the wife, the fact being proved or admitted that she is his wife. * * * But the question would still remain, whether the wives of the members of the classes privileged to enter were not entitled themselves to enter by reason of the right of the husband and without the certificate mentioned in the Act of 1884."

The above quotation is from page 463 of the report, and after reviewing some authorities, the Court makes decision as follows:

> "In our judgment, the wife in this case was entitled to come into the country without the certificate mentioned in the Act of 1884."

After this definite and final decision in the case, the Court proceeds to give consideration to other classes, who are admissible under the Treaty—merchants, students, travelers, and the like—and it then proceeds to say (over on page 466):

> "It is plain that in this case the woman could not obtain the certificate **as a member of any of those specially enumerated classes.** * * * She is neither

> an official, a teacher, a student, * * *. She is simply the wife of a merchant, who is himself a member of one of the classes mentioned in the Treaty as entitled to admission."

We think this language of the Court conclusively establishes the admissibility of the wife under her husband's status, or, as it might be stated, under her status as the wife of a merchant, and that the Court's reference to the impossibility of her securing an independent certificate of her own was made simply to emphasize the soundness of the conclusion already reached and announced.

And yet,

> "in the case of these minor children" (*Mrs. Gue Lim* case, page 468), "the same result must follow as in that of the wife. All the reasons which favor the construction of the statute as exempting the wife from the necessity of securing a certificate apply with equal force to the minor children of a member or members of the classes admitted. They come in by reason of their relationship to the father, and whether they accompany or follow him, a certificate is not necessary in either case."

II.

A MERCHANT IS NOT REQUIRED TO PROCURE A VISA FOR READMITTANCE.

The opinion in the instant case further says:

> "No one questioned the duty of a 'merchant' himself to get the proper papers as a condition to his readmittance."

The Court is under misapprehension, or has misinformation as to the practice in this respect. No certificate

or visa requirement is made as to a domiciled merchant seeking "readmittance." Indeed, the rule relied on in this case (see Appellant's Brief, pages 8 and 9), makes no such requirement. The visa requirement is not for domiciled merchants, but only for their wives and minor children.

Under the authority of the *Mrs. Gue Lim* case, to the effect that wives and minor children are "part" of the husband, it seems unusual, if not absurd, to require from them a certificate which is not required from the husband.

These domiciled merchants, admitted prior to July 1, 1924, go and come upon an immigration return certificate without any visa requirement.

III.

A VISA ON A SEC. 6 CERTIFICATE ISSUED BY CHINESE GOVERNMENT GIVES HOLDER PRIMA FACIE RIGHT OF ENTRY.

If this Court refers to the Section Six certificate issued by the Chinese Government upon a first entry into this country, which must be visaed by the consul, that is a provision of the statute and the treaty. That document gives him the prima facie right to enter this country upon presentation thereof.

In that regard Rule 4 of the Chinese rules provides:

> "A Chinese presenting the certificate prescribed by Section 6 of the Exclusion Act of July 5, 1884, in proper form, and accompanied by the necessary documents, duly visaed by a U. S. consular officer, shall be admitted, so far as the exclusion laws are concerned, upon identification of the proper holder of

> 'the certificate, unless such certificate is controverted, and the facts stated therein disproved upon investigation and examination. **Such certificate is prima facie evidence of the facts set forth therein** * * *. In accordance with instructions issued by the Department of State, consular officers to whom such certificates are presented, and by whom the accompanying documents are visaed, will forward to the immigration official in charge at the proposed port of entry a report of the completed investigation conducted by him, upon which the visa was issued, which shall include a recital of the family history of this applicant. Such report shall be filed with the record of the case for further reference.''

So we see, from the rule itself, and as a matter of fact, from the treaty, provision for the obtaining of such a certificate by the Chinese person from the Chinese Government or other foreign government, of which at the time such Chinese person shall be a subject. (See *Nagel v. Loi Hoa,* 72 L. Ed. 381.) In other words, if a Chinese merchant, having procured a certificate from his government, and the American consul having visaed the same, he is admitted into this country merely upon being identified by comparison with the picture on the visa with his physical person. The certificate and visa are prima facie evidence of the facts therein contained. This was the procedure set up in the treaty, and it is but reasonable that a Chinese subject coming to this country for the first time, in order to prove his mercantile status in China, that the place to prove it would be where the proof was available; and notwithstanding the fact that he obtained a certificate from the Chinese Government, he would have to submit proof to the satisfaction of the American consul before such consul would visa the cer-

tificate; but at least, when the consul put his visa upon this certificate, it was prima facie evidence of the Chinese' right to enter.

IV.

A VISA PROCURED BY WIFE OR MINOR CHILD OF MERCHANT DOES NOT GIVE HOLDER EVEN A PRIMA FACIE RIGHT OF ENTRY. IT IS MEANINGLESS. IF PROCURED IT ONLY GIVES RIGHT OF A HEARING BEFORE LABOR DEPARTMENT.

The Chinese Rules of October 1, 1926 (Rule 9) of the Immigration Department read:

> "The lawful wife and alien minor children of an alien Chinese merchant, specified in Rule 2 are admissible, whether such wife and minor children accompany the husband or father or follow to join him. Wives and alien minor children of alien Chinese are not admissible under any specific statutory authority, but under the decision of the United States Supreme Court, construing the provisions of the treaty of 1880, and holding they are not affected by subsequent legislation (268 U. S. 1, 336) such wives and minor children are therefore exempted from the requirement of obtaining the certificates prescribed by Section 6 of the Act of July 5, 1884 (268 U. S. 336) and are excepted from the provisions of Sections 5 and 13 C of the Immigration Act of 1924 (176 U. S. 459).
>
> In every application for entry there shall be exacted **convincing** proof of the relationship affirmed as the basis for admission; and the alleged husband and father, if accompanying the wife and minor children, must demonstrate as a condition precedent to their admission his own admissibility to the United States; or, if he is a resident of the United States at the time they apply for admission, and if he himself was origi-

nally admitted or entered before July 1, 1924, that he has been on an exempt status for the year preceding the application for admission of his wife or minor children, his testimony as to status being supplemented by two or more credible witnesses other than Chinese. The burden of proof to demonstrate admissibility to the United States is placed upon every applicant for entry under Section 23 of the Immigration Act of 1924."

We most strongly urge that the procurement of a visa by the applicant added no force or weight to his application for entry into the United States. He must prove that right by independent testimony under the rules and regulations of and by the Labor Department, which is the **only** agency of the government which can admit him. Now, it would be absurd to insist upon a procurement of a visa, and then not give it any force or effect; but that is just what happens here. Of what force or effect is the consular visa required of the appellee? ABSOLUTELY NONE! If he had the visa, it would not entitle him to enter the country, but he would still be subjected to the most rigid inquiry as to his relationship, and as to the mercantile status of his father. If he hasn't the visa, he cannot get a hearing. If he has the visa, he can get a hearing, but any finding of the consul would be absolutely useless and worthless to him in this hearing.

As to the requirement that such Chinese applicant must have a "passport or official document in the nature of a passport": This clause was evidently taken from the Immigration Rule (not the Chinese Exclusion Rules) No. 3, subdivision F, paragraph 2, which, in turn, was taken from Executive Order No. 4813 promulgated by President Coolidge, February 21, 1928 (Immigration Rules pages

100-102). But it is evident that this executive order was not intended to apply to Chinese Treaty merchants, for it is stated parenthetically in the first paragraph of said Executive Order No. 4813 that

> "(In addition to the general immigration laws and regulations there are special laws and regulations governing the admission of Chinese.)"

In the second place, the Chinese rules and regulations do not require treaty merchants and the members of their families to secure a passport or official documents in the nature of passports, but in lieu thereof the Chinese Exclusion rules provide for an entirely different kind of document. Rule 9, subdivision 3, provides for the preinvestigation of the exempt status of the husband or father upon an affidavit filed by him with the immigration officials; and if his exempt status is approved, the immigration officials are required to return to him the original copy of the affidavit submitted in the case and put a notation thereon in red ink, as follows:

> "Exempt status of affiant ..... conceded this date on basis of proof thereof submitted."

This affidavit, with the above notation thereon, is delivered to the husband or father with the suggestion that it be transmitted abroad for the use of the alleged wife or child in applying to an American consul for a visa. It will be noted that this document is neither a passport nor an official document in the nature of a passport, and, as previously stated, there is nothing in the immigration laws which requires such alien to secure a visa.

The above mentioned Executive Order No. 4813 was held to be invalid in so far as it was in conflict or in

excess of the requirements of the Immigration Act of 1924. See

Johnson v. Keating, 17 Fed. (2d) 50 (C. C. A. 1st), and

Serpico v. Trudell, 46 Fed. (2d) 669 (D. C. Vermont).

V.

EXECUTIVE OFFICERS HAVE NO RIGHT TO MAKE A RULE OR REGULATION WHICH THE LAW ITSELF DOES NOT REQUIRE.

The executive officers of the Government, including the President, have no authority to make any rules or regulations except as authorized by Congress, and they cannot make a requirement which the law does not authorize, or make a regulation including a class of persons, or things to be done, which the law itself does not require. In other words, the authority to prescribe regulations for the enforcement of an act of Congress does not authorize regulations enlarging or restricting the provisions of the act. This point is so well settled that citation to authorities does not appear necessary, but see the following cases:

Morrill v. Jones, 106 U. S. 466;

United States v. George, 228 U. S. 14;

United States v. United Verde Copper Co., 196 U. S. 207;

Leong Youk, 90 Fed. 648.

This Honorable Court, in *Shizuko Kumanomido v. Nagel,* 40 Fed. 42, held that

> "Rules and regulations prescribed by Immigration Commissioner, if conflicting with Congressional act or treaty, were, to that extent, void."

We can see no difference between the rules and regulations 58 and 59, set out in that opinion, and the rules and regulations with which we are confronted in the present case. In the *Kumanomido* case, supra, Rule 58 provided, among other things:

> "In order to obtain a visa under the statutory and treaty provisions referred to, the applicant must show that he is going to the United States in the course of business, which involves, substantially, trade or commerce between the United States and the territory stipulated in the treaty;"

and, as said by this Court:

> "These regulations purport to restrict the right to enter the United States to those engaged in trade between Japan and the United States, wholesale or retail. If these regulations conflict with an Act of Congress or with a treaty, which is the law of the land (U. S. Const., art. 6, cl. 2) they would to that extent be void." (Citing *Johnson v. Keating,* supra and other cases.)

And this Court went on to show that any such requirement by departmental rule was a limitation by the act of the Department upon the treaty right conferred upon the applicant, and was invalid.

And in the *Kumanomido v. Nagle* case, supra, Judge Wilbur used the following language which should guide the decision in the instant case:

> "The wives and minor children of resident Chinese merchants were guaranteed the right of entry by the treaty of 1880 and certainly possessed it prior to July 1st when the present Immigration Act became effective. (United States v. Mrs. Gue Lim, 176 U. S. 459, 20 S. Ct. 415, 44 L. Ed. 544, supra.) That act

must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioners from entry.

In a certain sense it is true that petitioners did not come 'solely to carry on trade.' But Mrs. Gue Lim did not come as a 'merchant.' She was nevertheless allowed to entry, upon the theory that a treaty provision admitting merchants by necessary implication extended to their wives and minor children. This rule was not unknown to Congress when considering the act now before us.

Nor do we think the language of section 5 (USCA Par. 205) is sufficient to defeat the rights which petitioners had under the treaty. In a very definite sense they are specified by the act itself as 'non-immigrants.' They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by this court twenty-five years ago.

In U. S. v. Mrs. Gue Lim, 176 U. S. 459, 20 S. Ct. 415, 418, 44 L. Ed. 544, it was held that a reasonable construction of the treaty and of the Chinese Exclusion Act required the admission of the wife and minor children as an incident to the right of the merchant himself, and there stated the rule that should control the judiciary in the interpretation of statutes where a strict construction of the statute would conflict with a treaty of the United States, as follows:

'The court should be slow to assume that Congress intended to violate the stipulations of a treaty so recently made with the government of another country * * *. Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court

cannot be unmindful of the fact that the honor of the government and the people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.' We ought, therefore, to so consider the act, if it can reasonably be done, as to further the execution, and not to violate the provisions of the treaty.

In Cheung Sum Shee v. Nagle, 268 U. S. 336, 45 S. Ct. 539, 540, 69 L. Ed. 985, the court, following the rule announced in the Gue Lim case, supra, said:

'That act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioners from entry.' ''

As said by the Supreme Court of the United States in the oft-quoted case of *Kwock Jan Fat v. White,* 63 L. Ed. 1010:

''The acts of congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government, applicable where the fundamental rights of men are involved, regardless of their origin or race.''

By the same token, the powers of the Secretary of Labor should not be enlarged by compelling a double

hearing, one before the consul in China, from which there is no appeal, and upon the consul's giving his so-called "approval" to have another hearing when the applicant arrives in this country, from which there is not only an appeal to the Secretary of Labor, but a review by the courts, within limits amply defined, to prevent an abuse of the extraordinary power granted to the Secretary of Labor.

By this circumvention of imposing an impossible condition, a substantial right is taken away from not only this appellee (the hardship of whose individual case we have not stressed, but who should not be the forgotten man), whom the Labor Department had found was entitled to enter into the United States, but the great principle is involved that if this rule is countenanced by the Court, the arbitrary decision of the consul can automatically result in the exclusion of the wife and minor children of all lawfully domiciled merchants from entry into this country. Surely, treaty rights should not be subject to the whim and caprice of some vice-consul in China. Even from the adverse decision of the Secretary of Labor there is an appeal; but from the vice-consul's whim or caprice the appellee is helpless.

In view of the foregoing facts and the laws applicable thereto, as the same appear from the record herein, your petitioner feels that this Honorable Court was in error in holding that the requirement that the minor son of a lawfully domiciled Chinese merchant must be excluded because he was without a passport or any official documents in the nature of a passport, visaed or authenticated by an American consular officer.

Your petitioner therefore prays that his petition for a rehearing herein be granted; that the order of the District Court of the United States for the Western District of Washington, Northern Division, granting the writ of habeas corpus and ordering the appellee and petitioner released from the custody of the Commissioner of Immigration, be sustained.

Dated, San Francisco,
June 2, 1933.

Respectfully submitted,
FRED H. LYSONS,
J. H. SAPIRO,
O. P. STIDGER,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

Fred H. Lysons, J. H. Sapiro and O. P. Stidger, the attorneys for the appellee and petitioner, hereby certify that in their judgment the foregoing petition for a rehearing is well founded, and that said petition is not interposed for purposes of delay.

Dated, San Francisco,
June 2, 1933.

FRED H. LYSONS,
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